U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529

U.S. Citizenship and Immigration Services

[redacted]

FILE: EAC 02 165 52449 Office: VERMONT SERVICE CENTER Date: SEP 17 2004

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a Chinese restaurant. It seeks to employ the beneficiary permanently in the United States as a specialty cook. As required by statute, the petition is accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

Provisions of 8 C.F.R. § 204.5(g)(2) state:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter hinges on the petitioner's ability to pay the wage offered from the petition's priority date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). The petition's priority date in this instance is April 27, 2001. The beneficiary's salary as stated on the labor certification is $12.09 per hour or $25,147.20 per year.

Counsel initially submitted, with the Immigrant Petition for Alien Worker (Form I-140), the petitioner's Form 1120, U.S. Corporation Income Tax Return, for the fiscal year from April 1, 1999 to March 31, 2000 (FY 1999), for evidence of its ability to pay the proffered wage as of the priority date. Further, the petitioner, in a letter dated March 18, 2002, stated that it has employed the beneficiary since March 1992. The director deemed the evidence of the ability to pay the proffered wage insufficient. In a request for evidence (RFE) dated July 26, 2002, the director required submission of the petitioner's 2001 federal income tax return, with schedules and attachments, or of its 2001 annual report with audited financial statement, as well as Wage and Tax Statements (Forms W-2), for evidence of the petitioner's wage payments to the beneficiary.

The petitioner's FY 1999-2001 Forms 1120 displayed taxable income, being all (losses), before net operating loss deduction and special deductions (viz., net income or loss). Schedules L, the balance sheet, reflected current assets minus current liabilities (viz., net current assets), being all (deficits), as follows: [1]

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[1] Current assets include cash, receivables, marketable securities, inventories, and prepaid expenses, generally, with a life of one year or less. Current liabilities consist of obligations, such as accounts payable, short term notes payable, and accrued expenses, such as taxes and salaries, payable within a year or less. *See Barron's Dictionary of Accounting Terms* 117-118 (3rd ed. 2000). If net current assets meet or exceed the proffered wage, the petitioner has demonstrated the ability to pay it for the period.

	FY 1999	FY 2000	FY 2001
Net income (losses)	$(5,297)	$(21,004)	$(16,002)
Current assets	$ 20,602	$ 12,222	$ 13,797
Current liabilities	$ 76,656	$ 63,554	$ 74,020
Net current assets (deficits)	$(56,054)	$(51,332)	$(60,223)

Also, in response to the RFE, the petitioner submitted a letter, dated October 17, 2002 (President's letter), claiming the impossibility of producing any Form W-2, but averring the weekly payment of $350 to the beneficiary, or $18,200 per year, less than the proffered wage. Counsel, moreover, contended that the beneficiary would replace the chef with no increase of payroll, that the petitioner was in operation for 20 years, and that legalization of employees reduces overwhelming labor shortages of chefs. *See* counsel's transmittal, dated October 17, 2002 (RFE brief).

The director noted the absence of any documentation of the petitioner's employment of, or amounts paid to, the beneficiary, concluded that the federal tax returns did not support the ability to pay the proffered wage, as of the priority date, or in any period continuing to the present, and denied the petition.

On appeal, counsel concedes that the federal tax returns do not attest to the petitioner's financial stability, but asserts that the brief on appeal will familiarize Citizenship and Immigration Services (CIS), formerly the Service or INS, with the true financial picture. First, counsel contends that CIS must add depreciation back to net income to see a true picture of the stated losses and, in particular, cites data for FY 2000. This statement is irrelevant, since the new figure is still a loss, and it does not related to the priority date. It contradicts established authority.

In determining the petitioner's ability to pay the proffered wage, CIS will examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Tex. 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F.Supp. 647 (N.D. Ill. 1982), *aff'd* 703 F.2d 571 (7th Cir. 1983).

In *K.C.P. Food Co., Inc.,* 623 F.Supp at 1084, the court held that CIS had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *See also Elatos Restaurant Corp.*, 632 F.Supp. at 1054.

Counsel reiterates, on appeal, the payment of $350 weekly to the beneficiary, and the President's letter avers it, but no documentation supports it. In any event, it amounts to $18,200 per year, less than the proffered wage. Their statements do not reflect that it is permanent, full time employment. Consequently, they support neither income relevant to the ability to pay the proffered wage, nor two (2) years of experience in the job offered or a related occupation, as set forth in Form ETA 750.

Significantly, provisions of the regulation at 20 C.F.R. § 656.3 effect restrictions against temporary or seasonal employment under § 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i):

> *Employment* means permanent, full-time work by an employee for an employer other than oneself.
>
> *Employer* means a person, association firm, or a corporation which currently has a location within the United States to which U.S. workers may be referred for employment, and which proposes to employ a full-time worker . . . .

Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *See Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Counsel's RFE brief suggested that the petitioner would replace a chef. On appeal, counsel indicates that the petitioner might replace one (1) of two (2), unnamed cooks or a manager. Counsel documents none of these possibilities or departures, but states they may have a favorable effect on cash flow or "free up $30,000 in payroll." The petitioner has not documented the position, duty, and termination of any cook who performed the duties of the proffered position as of the priority date or at any time. If the petitioner has already disbursed wages to others, they are not available to pay the beneficiary's at the priority date.

The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

There is no evidence that the positions of the chef and of the manager, involved the same duties as those set forth in the Form ETA 750. If that employee performed other kinds of work, then the beneficiary could not have replaced him or her.

In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Mandany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

For the first time, on appeal, counsel introduces the letter of Dominic Federico, Certified Public Accountant, dated March 17 2003 (CPA letter). The CPA letter indicates that the petitioner experienced financial setbacks due to a recent reorganization of the company and a major renovation to its building and parking areas. These events, also, lack any documentation or time frame and, thus, give little credible evidence either of profitable operations, or of the likelihood of resuming them. On appeal, the petitioner states that two (2) of its directors resigned in December 2000.

Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *See Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

The CPA letter refers to the petitioner's reorganization that has gone on for a year after March 2002. As just noted, it gives no period of profitable operation of the business and stipulates periods of unsuccessful results and internal disarray since, at least, 1999. Such evidence does not establish the ability to pay the proffered wage as of the priority date.

A petitioner must establish the elements for the approval of the petition at the priority date. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

The appeal brief, in exhibit B, offers three (3) pictures of stores under construction, asserts that they relate to the petitioner, and ties them, without any foundation, to the priority date:

> Another factor that lead to the decline in business revenues was a major renovation in the plaza that the Petitioner is located. The renovation occurred in 2001 and lasted the better part of six (6) months. The period of renovation clearly impacted the overall revenue of the Restaurant. (Please refer to Exhibit B).

The Form 1120 for FY 2001, however, actually shows gross receipts of $564,139, greater, not less than, those for FY 2000, $544,666. The gross receipts are inconsistent with the asserted, adverse impact in 2001. Furthermore, counsel lays no foundation for which six (6) months of 2001 the alleged the renovation disrupted operations or for the source and production of the pictures. Imprints on the backs of two (2) of the pictures record dates of August 2002, unrelated to the priority date and the supposed year of renovation.

Matter of Ho, 19 I&N Dec. 582, 591-592 (BIA 1988) states:

> It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.

The AAO does not believe that *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), justifies the approval of this I-140 petition. *Sonegawa* relates to a petition filed during uncharacteristically unprofitable or difficult years but only within a framework of profitable or successful years. The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and, also, a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and

universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

No unusual circumstances, parallel to those in *Sonegawa,* have been shown to exist in this case, nor has it been established that 2001 was an uncharacteristically unprofitable year for the petitioner.

After a review of federal tax returns, President's letter, RFE brief, brief on appeal and exhibits, and CPA letter, it is concluded that the petitioner has not established that it had sufficient available funds to pay the salary offered as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent residence.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.